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Protecting Rule 23 Class Members from Unfair Class Action Settlements: the Supreme Court's Amchem and Ortiz Decisions

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PROTECTING RULE 23 CLASS MEMBERS FROM UNFAIR CLASS ACTION SETTLEMENTS: THE SUPREME COURT'S *AMCHEM* AND *ORTIZ* DECISIONS

by Jennifer Dinham Henderson[†]

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I. INTRODUCTION

Since the implementation in 1966 of the current Rule 23 of the Federal Rules of Civil Procedure,¹ a recurring issue has been

1. Rule 23 of the Federal Rules of Civil Procedure reads:

Rule 23. Class Actions.

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) *Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.*

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) *Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) *Appeals.* A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

whether the class action device benefits anyone but the lawyers.² Are class members' rights getting lost in the administrative nightmare that some class actions have become? In particular, courts and lawyers involved in the settlement of these cases increasingly struggle with this dilemma. On one hand, there is the challenge of efficiently administering the settlement of claims that may affect the interests of thousands, if not hundreds of thousands, of potential plaintiffs.³ On the other hand, one must ensure that the rights and interests of those same potential plaintiffs are adequately protected.⁴

FED. R. CIV. P. 23. Rule 23 was amended April 24, 1998 to include Section (f) which became effective on December 1, 1998. FED. R. CIV. P. 23 advisory committee's notes.

2. Thomas E. Willging et al., *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules, Summary of Findings*, (Federal Judicial Center 1996), <http://air.fjc.gov/public/fjcweb.nsf/pages/173> (last visited August 14, 2000) [hereinafter *Empirical Study*]. According to the study, the debate focuses on three main issues:

First, does the aggregation of numerous individual claims into a class coerce settlement by raising the stakes of the litigation beyond the resources of the defendant? Second, does the class action device produce benefits for individual class members and the public—and not just to the lawyers who file them? And, finally, do those benefits outweigh the burdens imposed on the courts and on those litigants who oppose the class?

Id. (footnotes omitted).

3. An example of the problem cited is what the Supreme Court has referred to as the "asbestos-litigation crisis." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597-98 (1997). To describe the problem, the Supreme Court cited to a 1991 report by the U.S. Judicial Conference Ad Hoc Committee on Asbestos Litigation as follows:

[This] is a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s. On the basis of past and current filing data, and because of a latency period that may last as long as 40 years for some asbestos related diseases, a continuing stream of claims can be expected. The final toll of asbestos related injuries is unknown. Predictions have been made of 200,000 asbestos disease deaths before the year 2000 and as many as 265,000 by the year 2015.

The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

Id. (citations omitted).

4. Rule 23 requires adequate representation of class members. FED. R. CIV. P. 23(a)(4), 23(d)(2) and 23(e) (restated *supra* note 1).

Adequacy of representation for individual class members is the focus of the Supreme Court's analysis in a recent pair of cases dealing with the certification of settlement classes. In *Amchem Products, Inc. v. Windsor*⁵ and *Ortiz v. Fibreboard Corp.*,⁶ the Supreme Court wisely recognized that an individual class member's interests must be adequately protected, notwithstanding the problems that inevitably arise in the management and adjudication or settlement of these vast cases.⁷

The purpose of this article is to offer a brief review of the history of Rule 23 of the Federal Rules of Civil Procedure, and then to analyze the Supreme Court's holdings in *Amchem* and *Ortiz*. The article concludes with a brief comment on the future impact of this new precedent on class action practice.

II. HISTORY OF RULE 23

Rule 23 of the Federal Rules of Civil Procedure has a long, controversial history. The controversy continues today making the Supreme Court's discussion of the proper application of Rule 23 particularly important.

A. Creation Of Rule 23

The Supreme Court obtained the authority to create rules to govern practice and procedural matters in the federal courts when the Rules Enabling Act⁸ was enacted in 1934.⁹ Pursuant to its new authority, the Supreme Court adopted Rule 23 of the Federal Rules

5. 521 U.S. 591 (1997).

6. 527 U.S. 815 (1999).

7. *Amchem*, 512 U.S. at 621, *Ortiz*, 527 U.S. at 821.

8. 28 U.S.C. §§ 2072 - 2074 (1994). Section 2072 provides:

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

28 U.S.C. § 2072.

9. 48 STAT. 1064 (1934); see also B. Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961 to 1963 (I)*, 77 HARV. L. REV. 601, 603 (1964) [hereinafter Kaplan, 1961-63 Amendments].

of Civil Procedure¹⁰ in 1937.¹¹ The prerequisites to class certification, set forth in Rule 23(a), were essentially a restatement of former Equity Rule 38 which dealt with representatives of a class.¹² Under that Equity Rule, the preliminary inquiry was whether the question was "of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court."¹³

The second part of the rule tried to categorize different types of class actions in the following manner:

The categories of class actions in the original rule were defined in terms of the abstract nature of the rights involved: the so-called "true" category was defined as involving "joint, common, or secondary rights"; the "hybrid" category, as involving "several" rights related to "specific property"; the "spurious" category, as involving "several" rights affected by a common question and related to common relief.¹⁴

Many courts had problems interpreting the terms purporting to define the class categories.¹⁵ In part to deal with these problems, Congress created the Judicial Conference in 1958 to study the rules and make continuing recommendations to the Court regarding amendments.¹⁶ The Judicial Conference created a new rulemaking structure, appointing a Standing Committee to direct the Advisory

10. *Supra* note 1.

11. FED. R. CIV. P. 23 advisory committee's note.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. 28 U.S.C. § 331 (1994). Public Law 85-513 inserted a paragraph into this section which required "continuous study of the operation and effect of the general rules of practice and procedure." *Id.* at Historical and Statutory Notes. Today this paragraph provides:

The [Judicial] Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.

Id.; see also, Kaplan, 1961-63 Amendments, *supra* note 9, at 603.

Committee that drafts and publishes the rules.¹⁷ The Standing Committee coordinates with the Judicial Conference.¹⁸

B. The 1966 Amendments To Rule 23

In 1966, the Advisory Committee recommended several amendments to Rule 23.¹⁹ In drafting the amendments, the Advisory Committee tried to find and address recurring patterns arising in class action practice.²⁰ The current class action prerequisites set forth in Rule 23(a)²¹ were developed within this framework.²² Rule 23(a) was created to "emphasize[] that the class representatives ought to be squarely aligned in interest with the represented group."²³ The classes defined in Rules 23(b)(1), 23(b)(2) and 23(b)(3) replaced the confusing true, hybrid, and spurious categories.²⁴

Although the amendments to Rule 23 were approved and adopted in 1966,²⁵ there were some criticisms of the amendments.²⁶ One such criticism was that the changes to Rule 23 put too much discretionary power in the hands of judges.²⁷ Justice Black, dissent-

17. Kaplan, *1961-63 Amendments*, *supra* note 9, at 602.

18. *Id.*

19. B. Kaplan, *1967 Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 386 (1967) [hereinafter Kaplan, *1966 Amendments*].

20. *Id.*

21. *Supra* note 1.

22. Kaplan, *1966 Amendments*, *supra* note 19, at 386.

23. *Id.* at 387 n.120.

24. *Id.* at 375-394.

25. Fed. R. Civ. P. 23 advisory committee's note.

26. Kaplan, *1966 Amendments*, *supra* note 19, at 394.

27. *Id.*; see also Order Approving 1966 Amendments to the Rules of Civil Procedure, 383 U.S. 1031 (1966) (Black, J. dissenting) [hereinafter *1966 Order*]. In his dissent, Justice Black restates a memorandum he addressed to the Court wherein he wrote:

[I]t is my belief that the bad results that can come from the adoption of these amendments predominate over any good they can bring about. I particularly think that every member of the Court should examine with great care the amendments relating to class suits. It seems to me that they place too much power in the hands of the trial judges and that the rules might almost as well simply provide that class suits can be maintained either for or against particular groups whenever in the discretion of a judge he thinks it is wise. The power given to the judge to dismiss such suits or to divide them up into groups subjects members of classes to dangers that could not follow from carefully prescribed legal standards enacted to control class suits.

ing from the Supreme Court's approval of the amendments, worried that the discretion placed in the hands of the judges would result in depriving litigants of their right to a jury trial.²⁸ In fact, Justice Black worried that the entire rulemaking process created by the Rules Enabling Act was unconstitutional because many Rules of Civil Procedure "determine matters so substantially affecting the rights of litigants in lawsuits that in practical effect they are the equivalent of new legislation which, in our judgment, the Constitution requires to be initiated in and enacted by the Congress and approved by the President."²⁹

C. The 1996 Proposed Amendments To Rule 23

Five proposed changes to Rule 23 were published in August 1996.³⁰ Included in those changes was a proposed Rule 23(b)(4), intended to "explicitly authorize settlement classes."³¹ The proposed amendment would have superseded the Third Circuit's decision in *Georgine v. Amchem Products, Inc.*³² which decertified a settlement class on the basis that it did not meet the prerequisites for class certification outlined in Rule 23.

When the Supreme Court agreed to hear the *Amchem* case,³³ the Advisory Committee decided to table proposed Rule 23(b)(4) pending the decision.³⁴ The Advisory Committee noted:

Settlement classes raise[d] complicated issues. Some of

1966 Order, 383 U.S. at 1035.

28. 1966 Order, 383 U.S. at 1034. Referring to "loosely guided judicial discretion" over class action settlements, one commentator recently noted: "Perhaps unfair class settlements are like Justice Stewart's conception of 'hard-core pornography' — incapable of precise definition yet a judge will 'know it when [he] see[s] it.'" G. Donald Puckett, *Peering into a Black Box: Discovery and Adequate Attorney Representation for Class Action Settlements*, 77 TEX. L. REV. 1271, 1281 (1999). Puckett goes on to argue that judges should not have unguided discretion over class action settlements. *Id.* at 1281-1283.

29. Order Approving 1963 Amendments to the Rules of Civil Procedure, 374 U.S. 863, 865-66 (1963) (Black, J. dissenting) [hereinafter 1963 Order]; see also 1966 Order, 383 U.S. at 1032-33.

30. Minutes of the Civil Rules Advisory Committee, 1997 WL 1056241, at *4 (May 1-2, 1997).

31. Minutes of Judicial Conference Committee on Rules of Practice and Procedure, 1996 WL 936792, at *16 (June 19, 1996).

32. 83 F.3d 610 (3d Cir. 1996) [hereinafter *Georgine II*], *rev'd sub nom* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

33. Amchem Prods., Inc. v. Windsor, 519 U.S. 957 (1996) [hereinafter *Amchem Cert.*].

34. Minutes of the Civil Rules Advisory Committee, 1997 WL 1056241, at *4 (May 1-2, 1997).

these issues are likely to be resolved, and others illuminated, by the Supreme Court decision in the pending *Amchem* litigation. It was agreed in March that it would be premature to act further on proposed Rule 23(b)(4) before the Court has rendered its decision.³⁵

As a result of the Committee's decision, only one substantive change was made to Rule 23 in 1998.³⁶

III. THE *AMCHEM* DECISION

In June 1997, the Supreme Court decided *Amchem Products, Inc. v. Windsor*.³⁷ *Amchem* was an attempt by the Supreme Court to ensure fairness in the use of class action settlement procedures. At the time *Amchem* was decided, Rule 23(b)(3) certification, which allowed class members to opt out,³⁸ was the predominant method of certifying a settlement class.³⁹ The Supreme Court held in *Amchem* that prior to certifying a settlement class, there is a "heightened interest" in making sure the prerequisites outlined in Rule 23(a) and (b) have been satisfied.⁴⁰

A. *The Parties*

The *Amchem* case arose out of an effort to consolidate asbestos claims pending throughout the nation and settle them as to both

35. *Id.*

36. FED. R. CIV. P. 23 advisory committee's note. No substantive change was intended by the 1987 amendments, rather they were merely technical. *Id.* In 1998, the Court adopted Rule 23(f) which authorizes, in some circumstances, interlocutory appeals. FED. R. CIV. P. 23(f) (restated *supra* note 1).

37. 521 U.S. 591 (1997).

38. FED. R. CIV. P. 23(c)(2) (restated *supra* note 1). Rule 23(c)(2) directs the court to advise class members in a Rule 23(b)(3) class of the opportunity to opt out of the class. *Id.*

39. *Empirical Study*, *supra* note 2. The 1996 Federal Judicial Center Study of four judicial districts found that "roughly 50% to 85%" of classes certified in those districts were certified pursuant to Rule 23(b)(3). *Id.*; see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 618 (1997) (noting that "settlement only" classes have become "stock device[s]" under Rule 23(b)(3)).

40. *Amchem*, 521 U.S. at 620. Rule 23(a) outlines four minimum requirements that must be met before a class may be certified. FED. R. CIV. P. 23(a) (restated *supra* note 1). These requirements are often referred to as numerosity, commonality, typicality and adequacy of representation. *Amchem*, 521 U.S. at 613. A Rule 23(b)(3) class must meet two additional requirements. FED. R. CIV. P. 23(b)(3) (restated *supra* note 1). The two main ideas of the (b)(3) requirements are commonly referred to as predominance and superiority. *Amchem*, 521 U.S. at 615.

current and future claimants.⁴¹ On July 29, 1991, the Judicial Panel on Multidistrict Litigation transferred to one court and consolidated for pretrial proceedings all federal asbestos cases that had been filed but were not yet on trial.⁴² Parties to 26,639 lawsuits pending in eighty-seven federal districts were subject to the Panel's order.⁴³ Once the cases were consolidated, the plaintiffs and the defendants in the individual actions formed committees for the purpose of discussing the possibility of a global settlement.⁴⁴

B. *The Proposed Settlement*

The defendants' committee, which included a consortium of former asbestos manufacturers known as the Counsel for the Center for Claims Resolution ("CCR"),⁴⁵ demanded that a global settlement include not only inventory plaintiffs⁴⁶ cases, but also all asbestos claims that might arise in the future against the named defendants.⁴⁷ When settlement talks between the plaintiffs' committee and the defendants' committee fell apart, CCR continued without the other defendants to discuss a global settlement, including the settlement of future claims, with the plaintiffs' committee.⁴⁸ Only after CCR and the plaintiffs' committee reached a tentative agreement that purported to settle the claims of *future claimants*, did the defendants agree to settle the claims of the inventory plaintiffs.⁴⁹

41. *Amchem*, 521 U.S. at 597.

42. *Id.* at 599 (citing *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 421-424 (J.P.M.L. 1991)).

43. *Asbestos Prods. Liab. Litig. No. VI*, 771 F. Supp. at 416.

44. *Amchem*, 521 U.S. at 599-600.

45. *Id.* The Court identified CCR as follows:

The CCR Companies are Amchem Prods., Inc.; A.P. Green Industries, Inc.; Armstrong World Industries, Inc.; Asbestos Claims Management Corp.; Certainteed Corp.; C.E. Thurston & Sons, Inc.; Dana Corp.; Ferodo America, Inc.; Flexitallic, Inc.; GAF Building Materials, Inc.; I.U. North America, Inc.; Maremont Corp.; National Services Industries, Inc.; Nosroc Corp.; Pfizer Inc.; Quigley Co.; Shook & Fletcher Insulation Co.; T & N, PLC; Union Carbide Corp.; and United States Gypsum Co. All of the CCR petitioners stopped manufacturing asbestos products around 1975.

Id.

46. The parties referred to plaintiffs with pending cases as "inventory plaintiffs." *Id.* at 600.

47. *Id.* at 600-601.

48. *Id.*

49. *Id.* Thus, the plaintiffs' committee had added incentive to negotiate a set-

Once the settlement was reached, the plaintiffs' committee and CCR brought this case in federal court as a 'settlement class action' to settle the claims of both inventory and future plaintiffs.⁵⁰

The parties' intent was never to litigate the case.⁵¹ Instead, the case was brought solely for purposes of settling any future asbestos-related claims against the CCR defendants.⁵² The proposed class included all persons⁵³ who "had been exposed — occupationally or through the occupational exposure of a spouse or household member — to asbestos or products containing asbestos attributable to a CCR defendant."⁵⁴ The class was limited further only to the extent that it excluded class members who had previously filed suit against any of the CCR defendants for asbestos-related injuries.⁵⁵

The initiation of the suit, the parties filed pleadings which included a proposed 100-page settlement agreement.⁵⁶ That agreement set forth a detailed "administrative mechanism and a schedule of payments to compensate class members who [met] defined asbestos-exposure and medical requirements."⁵⁷

tlement on behalf of future claimants. *Id.* at 601. In return for the negotiated settlement relating to future plaintiffs, the CCR defendants agreed to settle with the inventory plaintiffs. *Id.* As the court stated: "In one such agreement, CCR defendants promised to pay more than \$200 million to gain release of the claims of numerous inventory plaintiffs." *Id.*

50. *Id.* The Third Circuit explained the theory behind the settlement class action as follows:

A settlement class is a device whereby the court postpones formal class certification until the parties have successfully concluded a settlement. If settlement negotiations succeed, the court certifies the class for settlement purposes only and sends a combined notice of the commencement of the class action and the settlement to the class members. By conditionally certifying the class for settlement purposes only, the court allows the defendant to challenge class certification in the event that the settlement falls apart.

Georgine II, 83 F.3d at 625 n.9.

51. *Amchem*, 521 U.S. at 601.

52. *Id.*

53. The court defined "persons" in this case as people who were exposed to asbestos, or their spouses, children or other household members. *Id.* at 602.

54. *Id.*

55. *Id.*

56. *Id.* The proposed settlement was contingent on the outcome of a third-party suit filed by CCR against their insurers that would hold the insurers liable for the costs of the settlement. *Id.*

57. *Id.* at 603. Some of the key provisions of the settlement agreement are as follows:

(i) Only four categories of disease were deemed compensable and, for each category, a range of damages was specified. Moreover, CCR had the discretion to determine the amount (within the range) to be paid. The

C. Class Certification

Notwithstanding the protests of several objectors, the district court certified the final class under Rule 23(b)(3) and simultaneously approved the settlement as "fair, adequate, and reasonable to the class within the meaning of Rule 23(e)."⁵⁸ Subsequently, when several objecting class members who had failed to opt out of the class tried to bring actions against the CCR defendants, the same district court issued a temporary injunction enjoining those class members from bringing suit.⁵⁹ It is from that order that the objec-

agreement placed caps on the amount of damages available for any one disease in any one year.

(ii) The agreement contained a provision for "exceptional" (i.e. otherwise non-compensable) claims, but there was a cap on the number of claims covered and the amount of damages that could be awarded in any one year.

(iii) Several claims that may otherwise be compensable under state laws were not compensable under the settlement agreement.

(iv) The settlement agreement did not allow for adjustment of compensation based on inflation.

(v) Disputes relating to compensation and/or medical diagnoses were to be settled through administrative procedures outlined in the settlement agreement.

(vi) The settlement agreement bound class members in perpetuity, yet the CCR defendants had the option to withdraw from the settlement after ten years.

(vii) The settlement agreement provided that a few class members per year could reject the settlement and pursue claims in court, but those plaintiffs would be precluded from asserting certain claims, including punitive damages.

See *id.* at 603-605.

58. *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 325 (E. D. PA. 1994) [hereinafter *Georgine I*]. The court held as follows:

(2) [T]he prerequisites for final class certification of the class as defined in the findings of fact are satisfied, (3) the terms of the Stipulation of Settlement, as amended, are fair to the class as a whole pursuant to FED.R.CIV.P. 23(e), (4) Class Counsel were qualified to represent the class and acted without conflict of interest, without collusion, and appropriately in negotiating the Stipulation of Settlement, and (5) the notice materials, the plan for and the actual dissemination of the notice satisfied the requirements of FED.R.CIV.P. 23(c)(2) and (e) and the Due Process Clause of the Constitution, and accordingly it is hereby ORDERED that an opt-out settlement class is finally CERTIFIED pursuant to FED.R.CIV.P. 23(b)(3). . .

Id. at 337; see also *Amchem*, 521 U.S. at 606, 608.

59. *Georgine II*, 83 F.3d at 727. The district court's order specifically stated: [A]ll members of the class certified by the Court by Order dated August 16, 1994, and each of them, who have not individually filed timely Exclusion Requests, their respective attorneys and all persons acting in concert with them and who receive a copy of this injunction or notice

tors appealed.⁶⁰

The Court of Appeals for the Third Circuit vacated the class certification order, holding the requirements set forth in Rule 23(a) and 23(b)(3) had not been satisfied, and that the district court should not have considered the settlement as a factor in the certification decision.⁶¹ Although the court of appeals held the settlement should not be a factor in the determination of class certification, it nevertheless closely examined the settlement negotiated by the plaintiffs' committee and CCR and used the settlement to show why the requirements for class certification had not been met.⁶² The Supreme Court granted certiorari on November 1, 1996⁶³ and affirmed, in *Amchem Products, Inc. v. Windsor*,⁶⁴ the Third Circuit's decision, with only a slight modification allowing the fact of the settlement to be considered as part of the certification in-

of the existence of this injunction, are hereupon PRELIMINARILY ENJOINED AND PROHIBITED from initiating or maintaining any asbestos-related personal injury or death claim(s) or lawsuit(s) against any CCR defendant in any court, either by way of commencing litigation, intervening in existing litigation, joining a CCR defendant in any existing litigation, or in any other manner asserting such a claim, or further prosecuting any claim filed after January 24, 1994, except to arrange for deferral of an action filed on or before the date of this Order until the issuance of final judgment on the merits of this case.

Id. at 727 (footnotes omitted). One of the claimants affected by this order was Margaret Balonis. *Amchem*, 521 U.S. at 605. Since her husband was diagnosed with an asbestos-related injury in May 1994 (after the opt-out period expired on January 24, 1994) the settlement agreement purported to preclude his claim. *Id.* The Balonises nevertheless filed suit in Maryland state court in December 1994. *Id.* According to the Balonises brief to the Supreme Court:

They argued that under the settlement they would have to settle their case against CCR for between \$37,000 and \$60,000, as set out in the compensation schedule. They noted that, in contrast, mesothelioma cases in Baltimore courts tried to a verdict render judgments from \$1 million-\$9 million, with a majority of verdicts between \$2 million and \$4 million. On July 11, 1995, the District Court issued an order citing the Balonis plaintiffs and their attorney for civil contempt, ordering them to cease prosecution of the Maryland state court action against CCR, and directing CCR to file, for the court's consideration, a motion for costs and attorneys' fees.

Brief for Respondents Casimir and Margaret Balonis at 26, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (No. 96-270), 1997 WL 13204, at *26 (January 15, 1997); see also *Amchem*, 521 U.S. at 605 n.7. In October 1996, Casimir Balonis died. *Id.*

60. *Amchem*, 521 U.S. at 608.

61. *Georgine II*, 83 F.3d at 617.

62. *Amchem*, 521 U.S. at 609.

63. *Amchem Cert.*, 519 U.S. at 957.

64. 521 U.S. 591 (1997).

quiry.⁶⁵

D. The Court's Analysis

The main difference of opinion between the district court and the Third Circuit centered on "the extent to which a proffered settlement affects court surveillance under Rule 23's certification criteria."⁶⁶ The Supreme Court reviewed those decisions via *Amchem* to "decide the role settlement may play, under existing Rule 23, in determining the propriety of class certification."⁶⁷

1. The Fairness Test Under Rule 23(E)

Rule 23(e) provides that "a class action shall not be dismissed or compromised without the approval of the court."⁶⁸ Federal courts have developed a "fairness test" to assess whether a particular class action settlement should be approved under Rule 23(e).⁶⁹ According to the fairness test, a district court must decide that a settlement is fair, adequate and reasonable before it can approve it.⁷⁰

65. *Amchem*, 521 U.S. at 591.

66. *Id.* at 618. Prior to the *Amchem* decision, several circuits were divided on this issue. Compare *Georgine II*, 83 F.3d at 617, and *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768,799-800 (3d Cir. 1995) with *In re Asbestos Litig.*, 90 F.3d 963, 975 (5th Cir. 1996) [hereinafter *Asbestos Litig. I*], cert. granted and judgment vacated, *Ortiz v. Fibreboard Corp.*, 521 U.S. 1114 (1997) [hereinafter *Ortiz Cert.*], on remand to *In re Asbestos Litig.*, 134 F.3d 668 (5th Cir. 1998) [hereinafter *Asbestos Litig. II*], rev'd, *Ortiz v. Fibreboard Corp.*, 119 S.Ct. 2295 (1999), and *White v. Nat'l Football League*, 41 F.3d 402, 408 (8th Cir. 1994), cert. denied, 515 U.S. 1137 (1995) [hereinafter *NFL II*].

67. *Amchem*, 521 U.S. at 619. The phrase "under existing Rule 23" is a reference to the proposed Rule 23(b)(4) which, if passed, would have authorized certification of settlement classes under Rule 23(b)(3), even in cases when the (b)(3) requirements have not been met. *Id.*

68. FED. R. CIV. P. 23(e) (restated *supra* note 1.) (emphasis added).

69. Puckett, *supra* note 28, at 1276. Puckett describes the standard adopted by the federal courts as a "fairness test." *Id.*

70. See e.g., *Thomas v. Albright*, 139 F.3d 227, 231 (D.C. Cir. 1998), cert. denied *sub nom.* *Fields v. Albright*, 525 U.S. 1016 (1998) (stating "before it can approve a settlement, a district court 'must find that the settlement is fair, adequate and reasonable and is not the product of collusion between the parties.'") (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir.1977)); *Van Horn v. Trickey*, 840 F.2d 604, 606 (8th Cir. 1988) (stating "[i]n approving a class settlement, the district court must consider whether it is 'fair, reasonable, and adequate.'"); *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 22 (2d Cir.1987) (stating "[i]n approving a proposed class action settlement, the district court has a fiduciary responsibility to ensure that 'the settlement is fair and not a product of collusion, and that the class members' interests were represented adequately.'") (quoting *In re Warner Com-*

Prior to *Amchem*, several courts had determined that, once a settlement was approved as fair, adequate and reasonable pursuant to Rule 23(e), strict adherence to the prerequisites set forth in Rules 23(a) and (b) were not required.⁷¹

In *Amchem*, the Court changed the context in which the fairness test is generally applied. Instead of allowing "a fairness inquiry under Rule 23(e) [to] control certification, eclipsing Rule 23(a) and (b)," class certification "demand[s] undiluted, even heightened, attention in the settlement context."⁷² Thus, Rule 23(e) must be read as imposing an additional requirement, beyond the prerequisites outlined in Rule 23(a) and 23(b), to ensure that the settlement is fair and adequate.⁷³ Certification of settlement classes should often be *more* closely scrutinized than certification of non-settlement classes.⁷⁴ Class certification should not be granted based on a judge's "overarching impression of the settlement's fairness."⁷⁵

2. Examining The Pleadings Under Rules 23(A) And 23(B)(3)

Because *Amchem* involved a class certified pursuant to Rule 23(b)(3), the predominance and superiority requirements were also pre-requisites to class certification.⁷⁶ In that regard, the Court found that the benefits [class members] might gain from [the settlement] . . . [are] not pertinent to the predominance inquiry"⁷⁷ The Court wisely held that such a reading of Rule 23(b)(3) would render that section meaningless.⁷⁸ Instead, the Court held the predominance inquiry should, similar to a Rule 23(a)(3) typicality in-

munications Sec. Litig., 798 F.2d 35, 37 (2d Cir.1986)).

71. *Amchem*, 521 U.S. at 618-619 (stating that some "courts have held that settlement obviates or reduces the need to measure a proposed class against the enumerated Rule 23 requirements.") (citing *Asbestos Litig. I*, 90 F.3d at 975; *NFL II*, 41 F.3d at 408; *In re A.H. Robins Co.*, 880 F.2d 709, 740 (4th Cir. 1989), *cert. denied*, 493 U.S. 959 (1989); *Malchman v. Davis*, 761 F.2d 893, 900 (2d Cir. 1985), *cert. denied*, 475 U.S. 1143 (1986)).

72. *Amchem*, 521 U.S. at 620.

73. *Id.* at 621.

74. *Id.* at 621 & n.16 (acknowledging Third Circuit's observation that "proposed settlement classes sometimes warrant more, not less caution on the question of certification.") Prior to the *Amchem* decision, many courts, including the Eighth Circuit, had held "settlement obviates the need to measure a proposed class against the enumerated Rule 23 requirements." *Id.* at 618 (referring to *NFL II*, 41 F.3d at 408).

75. *Id.* at 621.

76. FED. R. CIV. P. 23(b)(3) (restated *supra* note 1.)

77. *Amchem*, 521 U.S. at 622-623.

78. *Id.*

quiry, be based on the pleadings.⁷⁹

The Court also compared the predominance requirement to the commonality requirement under Rule 23(a)(2) and found that "the predominance criterion is far more demanding than the commonality prerequisite."⁸⁰ Therefore, the predominance requirement is not satisfied simply because the Court finds questions of law for fact common to the class.⁸¹ Instead, the appropriate test required by Rule 23(b)(3) is whether " *legal or factual questions* that qualify each class member's case as a genuine controversy" are *predominantly* common, instead of those questions being individual to each class member.⁸²

3. Adequate Representation Under Rule 23(A)(4)

There are two bases for the requirement under Rule 23(a)(4) that the named parties "fairly and adequately protect the interests of the class."⁸³ First, it "serves to uncover conflicts of interest between named parties and the class they seek to represent."⁸⁴ Second, it "factors in competency and conflicts of class counsel."⁸⁵ While the Court declined to address the adequacy of counsel in this case, it found the named representatives did not adequately represent the interests of the named class.⁸⁶

The Court held that Rule 23(a)(4) was not satisfied because the disparity of interests among class members (particular among the "currently injured" and the "exposure only" plaintiffs) presented inevitable and insurmountable conflicts.⁸⁷ The objective of "currently injured" plaintiffs was "generous immediate payments."⁸⁸ Meanwhile, the objective of "exposure only" plaintiffs was "ensuring an ample, inflation-protected fund for the future."⁸⁹ These objectives conflicted and thus, the creation of one broad plaintiffs' class was impermissible because the named class representatives could

79. *Id.* at 623 & n.18.

80. *Id.* at 623-624.

81. *Id.*; see also FED. R. CIV. P. 23(a)(2) (restated *supra* note 1).

82. *Amchem*, 521 U.S. at 622-623 (emphasis added).

83. *Id.* at 625; see also FED. R. CIV. P. 23(a)(4) (restated *supra* note 1).

84. *Amchem*, 521 U.S. at 625.

85. *Id.* at 626 & n.20.

86. *Id.* at 625-626 & n.20.

87. *Id.* at 625-626.

88. *Id.* at 626.

89. *Id.*

not adequately protect both interests.⁹⁰ The district court's failure to create subclasses meant that "there was no structural assurance of fair and adequate representation for the diverse groups of individuals affected" by the proposed settlement.⁹¹

4. *Notice And Opt Out Requirements*

In addition to the findings noted above, the Court provided instructive dicta regarding class action notice and opt-out requirements.⁹² Federal Rule 23(c)(2) requires, for classes certified pursuant to only Rule 23(b)(3), that class members be notified and provided with an option to "opt out" of the class.⁹³ The purpose of this section of the rule is to respect discrete interests of class members embraced by a class formed pursuant to Rule 23(b)(3).⁹⁴ A class member who elects to opt out of the class will not be bound by the terms of a settlement or adjudication in that matter.⁹⁵

The Court commented that the ability to bind "exposure only" class members to the settlement would have been "highly problematic."⁹⁶ The Court felt that the ability to provide adequate notice to those class members was impeded by certain factors.⁹⁷ First, many future plaintiffs would not recognize the significance of the notice, even if it reached them, because they may not yet be aware of whether, or to what extent, they may have been affected by asbestos.⁹⁸ Moreover, some future plaintiffs "may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out."⁹⁹ The Court recognized that notice to "legions so unselfconscious and amorphous" might never be sufficient.¹⁰⁰

E. *Post-Amchem Developments*

In 1996 the Fifth Circuit approved an asbestos class action set-

90. *Id.*

91. *Id.* at 627.

92. *Id.* at 628.

93. FED. R. CIV. P. 23(c)(2) (restated *supra* note 1).

94. FED. R. CIV. P. 23(c)(2) advisory committee's notes.

95. *Id.*

96. *Amchem*, 521 U.S. at 628.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

dement under Rule 23(b)(1)(B) in *In re Asbestos Litigation*.¹⁰¹ After the Supreme Court decided *Amchem*, it vacated the Fifth Circuit's decision and asked it to reconsider the case.¹⁰² The Fifth Circuit reviewed its original decision, but affirmed its holding that class certification was appropriate.¹⁰³ The Fifth Circuit stated that it could find nothing in the *Amchem* opinion to change its prior decision.¹⁰⁴ As a result, the Supreme Court again granted certiorari.¹⁰⁵ In *Ortiz v. Fibreboard Corp.*,¹⁰⁶ the Supreme Court reversed the Fifth Circuit's decision.

IV. THE ORTIZ DECISION

In June 1999, almost two years to the day after the *Amchem* decision, the Supreme Court decided *Ortiz v. Fibreboard Corp.*¹⁰⁷ The *Ortiz* decision reinforces the holdings in *Amchem*. Again the Court emphasized that each of the prerequisites outlined in Rule 23(a) must be met before a class may be certified.¹⁰⁸ However, in contrast to the *Amchem* decision, which dealt with classes formed under Rule 23(b)(3), *Ortiz* dealt with the certification of a settlement class as a "limited fund" class pursuant to Rule 23(b)(1)(B).¹⁰⁹ Limited fund classes differ from those certified pursuant to Rule 23(b)(3) in that they do not "provide for absent class members to receive notice and to exclude themselves from class membership as a matter of right."¹¹⁰ Thus, class members cannot "opt out" of the class.

Based in part on this perceived hardship, the Court in *Ortiz* held the "limited fund" must be limited by some factor other than the agreement of the parties.¹¹¹ Moreover, where claimants to the fund are class members, all allocations among them must be made on an equitable, pro rata basis, taking into account conflicting in-

101. 90 F.3d 963 (5th Cir. 1996).

102. *Ortiz Cert.*, 521 U.S. at 1114.

103. *Asbestos Litig. II*, 134 F.3d at 668.

104. *Id.*

105. *Ortiz v. Fibreboard Corp.*, 524 U.S. 936 (1998).

106. 527 U.S. 815 (1999).

107. *Id.*

108. *Id.* at 831.

109. *Id.*; see also FED. R. Civ. P. 23(b)(1)(b) (restated *supra* note 1). "Rule 23(b)(1)(B) includes, for example, 'limited fund' cases, instances when numerous persons may make claims against a fund insufficient to satisfy all claims." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997).

110. *Ortiz*, 527 U.S. at 833 & n.13.

111. *Id.* at 821.

terests among those class members.¹¹² If these elements are not satisfied, the class may not be certified.

A. *The Parties*

Like *Amchem*, *Ortiz* is a case dealing with the proposed nationwide settlement of asbestos claims of both inventory and future plaintiffs.¹¹³ Fibreboard Corporation, one of the respondents in *Ortiz*, had manufactured products containing asbestos from the 1920's through 1971.¹¹⁴ Fibreboard defended its first suit for asbestos-related personal injury claims in 1967 and the number of claims against it continued to grow since that time.¹¹⁵

Between May 1957 and March 1959, Fibreboard was insured by Continental Casualty Company which had provided Fibreboard with a comprehensive general liability policy with no aggregate limit.¹¹⁶ Fibreboard was insured by Pacific Indemnity Company under a similar policy from 1956 to 1957.¹¹⁷ When both insurance companies refused to indemnify Fibreboard for the full amount of the claims accruing between 1957 and 1959, Fibreboard sued them for the funds.¹¹⁸ That litigation continued into the early 1990's, at which time Fibreboard and the insurance companies began to contemplate a joint settlement with asbestos plaintiffs that would limit their respective liabilities in connection with asbestos claims.¹¹⁹

B. *The Proposed "Limited Fund" Settlement*

Fibreboard, Continental and Pacific (collectively referred to as Respondents) sought experienced asbestos counsel to represent a prospective class of *plaintiffs* in a settlement class action.¹²⁰ In order to ensure "total peace" for Respondents from any future asbestos claims, the proposed global settlement was structured on the prem-

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 822.

116. *Id.*

117. *Id.*

118. *Id.* at 823.

119. *Id.* at 823-824.

120. *Id.* at 824. Fibreboard was the first to approach the attorneys. *Id.* at 823. In February 1993, the trial court in the litigation between Fibreboard and Continental ruled in favor of Fibreboard. *Id.* at 824. At that time, Continental decided to join in the global settlement discussions. *Id.*

ise of a mandatory class action from which no plaintiff would be entitled to opt out.¹²¹ The Respondents eventually agreed to contribute money to a fund against which class members could make claims.¹²² Continental and Pacific agreed to contribute \$1.525 billion to the fund, while Fibreboard contributed five hundred thousand dollars from its own assets, and an additional \$9.5 million from other insurance proceeds.¹²³ In case the global settlement agreement was not approved, the Respondents entered into an agreement known as the "Trilateral Settlement Agreement" whereby Continental and Pacific would contribute two billion dollars to Fibreboard to defend against asbestos claims.¹²⁴

C. Class Certification

Once a preliminary settlement was agreed on, the appointed counsel for the plaintiffs filed suit pleading personal injury claims against Fibreboard and seeking class certification for settlement purposes of a mandatory class pursuant to Rule 23(b)(1)(B).¹²⁵ The district court granted preliminary certification of the class, conducted a campaign to notify potential class members of the pending settlement, and provided a fairness hearing.¹²⁶ The district court subsequently gave final approval to certification of the class and "approved the settlement as 'fair, adequate and reasonable' under Rule 23(e)."¹²⁷

The district court's reasoning that class certification was appropriate under the concept of a 'limited fund' was based on its definition of that term. The district court found alternative limited funds it thought might satisfy Rule 23(b)(1)(B).¹²⁸ The court said the \$1.535 billion insurance contribution was a limited fund or, in the alternative, the value of Fibreboard plus the value of its insurance coverage was a limited fund.¹²⁹ In either case, according to the court, the requirements of Rule 23(b)(1)(B) would be satis-

121. *Id.*

122. *Id.*

123. *Id.* at 825.

124. *Id.*

125. *Id.* at 827.

126. *Id.*

127. *Id.*; see also *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505, 527 (E.D. Tex. 1995).

128. *Ortiz*, 527 U.S. at 828.

129. *Id.*

fied.¹³⁰

The Fifth Circuit affirmed the district court's class certification decision and its finding that the settlement was adequate.¹³¹ For the reasons analyzed below, the Supreme Court reversed.

D. The Court's Analysis

In *Ortiz*, the Supreme Court was concerned with several aspects of the Fifth Circuit's discussion of the requirements outlined in Rule 23. Because the district court certified the class under Rule 23(b)(1)(B), the Court decided to analyze the Fifth Circuit's discussion of commonality, typicality and adequacy of representation within the context of Rule 23(b)(1)(B).¹³²

1. Criticism Of The Limited Fund Under Rule 23(B)(1)(B)

The Court's main concern in *Ortiz* was the nature of the purportedly limited fund relied upon by the district court and the Fifth Circuit in certifying the class.¹³³ The Supreme Court defined the traditional representative suit encompassed by Rule 23 as "those involving 'the presence of property which call[ed] for distribution or management'... 'Classic' limited fund actions 'include claimants to trust assets, a bank account, insurance proceeds, company assets in a liquidation sale, proceeds of a ship sale in a maritime accident suit, and others.'"¹³⁴ The nature of a limited fund class action is:

equity require[s] absent parties to be represented, joinder being impracticable, where individual claims to be satisfied from the one asset would, as a practical matter, prejudice the rights of absent claimants against a fund inadequate to pay them all.¹³⁵

Thus, the type of fund generally subject to this kind of class action contains a finite amount insufficient to pay all claims.

The Court notes that, although they may arise under different circumstances, limited fund class actions have three common char-

130. *Id.*

131. *Asbestos Litig. I*, 90 F.3d at 963.

132. *Ortiz*, 527 U.S. at 830.

133. *Id.*

134. *Id.* at 834 (quoting J. Moore and J. Friedman, 2 FEDERAL PRACTICE 2240 (1938) and 1 H. NEWBERG AND A. CONTE, CLASS ACTIONS, section 4.09 at 4-33 (3d ed. 1992)).

135. *Ortiz*, 527 U.S. at 836.

acteristics.¹³⁶ First, "the equity of the limitation is its necessity."¹³⁷ In other words, the fund is described as limited because of its inability to satisfy the total amount of the claims against it. Therefore, it is fair to bind all claimants in order to fairly allocate the proceeds. Second, the defendant or trustee has no right to parcel out or control the limited fund.¹³⁸ Rather, the entire amount of the fund must "be devoted to the overwhelming claims."¹³⁹ Third, the claimants to the fund are identified by their common theory of liability and compensated by the fund according to an equitable, pro rata distribution.¹⁴⁰ Although adherence to these characteristics leads to a narrow construction of Rule 23(b)(1)(B), the Court opined that the burden of showing the necessity of a broader construction was on the party seeking "departure from the traditional norm."¹⁴¹

The Court held it is the duty of the court considering class certification to closely examine whether the alleged limited fund is truly limited in the traditional sense under Rule 23(b)(1)(B).¹⁴² To make such a determination the court is required to hold a fact finding hearing to allow opponents to attack the limited fund.¹⁴³ The parties must present evidence showing the limits on the fund and the alleged insufficiency of the fund.¹⁴⁴ The Rule 23(e) fairness hearing may not "substitute for rigorous adherence to those provisions of the Rule 'designed to protect absentees,' . . . among them

136. *Id.* at 838-841.

137. *Id.* at 839.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 842. The Court suggested three good reasons "to treat these characteristics as presumptively necessary, and not merely sufficient, to satisfy the limited fund rationale for a mandatory action." *Id.* The three reasons cited by the Court which support this interpretation are (i) this interpretation of the rule is consistent with the Advisory Committee's expressed understanding of the provision; (ii) this interpretation "minimizes potential conflict with the Rules Enabling Act;" and (iii) the construction "avoids serious constitutional concerns raised by the mandatory class resolution of individual legal claims, especially where a case seeks to resolve future liability in a settlement-only action." *Id.*

142. *Id.* at 848.

143. *Id.* at 848-849. In so holding, the Court followed similar holdings set forth in *In re Temple*, 851 F.2d 1269, 1272 (11th Cir. 1988), *In re Dennis Greenman Securities Litig.*, 829 F.2d 1539, 1546 (11th Cir. 1987) and *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 306 (6th Cir. 1984). *Id.*

144. *Id.* at 849-850. There is disagreement among the federal circuits regarding the proper standard for evaluating a limited fund in mass tort cases, but the court refused to clarify that standard at this time. *Id.* at 848 & n.26.

subdivision (b)(1)(B)."¹⁴⁵

Based on the perceived conflicts between the limited fund in *Ortiz* and the traditional limited fund concept, the Court held that the failure of the appellate court to critically examine the *Ortiz* limited fund was error.¹⁴⁶ The district and appellate courts in *Ortiz* did try to determine the limits on Fibreboard's ability to satisfy the aggregate claims of class members by attempting to determine the value of Fibreboard.¹⁴⁷ However no such effort was made with regard to the insurance companies.¹⁴⁸ The two billion dollars contributed by the insurance companies to the Trilateral Settlement Agreement and the \$1.535 billion contributed towards the global settlement were amounts which the insurance companies agreed to pay, as opposed to an independent evaluation of their obligations.¹⁴⁹

Moreover, the fact that the class, as defined by the district court, excluded up to one-third of the potential claimants against Fibreboard,¹⁵⁰ was contrary to both the concept of limited fund treatment and the structural protections set forth in Rule 23.¹⁵¹ The fact that there were settlement funds available *outside* of those contemplated by the global settlement is contrary to the entire theory behind a limited fund class action.¹⁵²

145. *Id.* (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)).

146. *Id.* at 848.

147. *Id.* at 850-851.

148. *Id.* at 851.

149. *Id.*

150. *Id.* at 854. The Court noted that many of the claimants excluded from the class, who subsequently received settlements on better terms than class members, were represented by plaintiffs' counsel. *Id.*

151. *Id.* at 858-859. For clarification of the limited fund concept, the Court cites to a discussion of bills of peace and the traditional limited fund which explains that "[t]he fund or limited liability is like a mince pie, which can not be satisfactorily divided until the carver counts the number of persons at the table." *Id.* at 840-841 (quoting Z. Chafee, *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297, 1311 (1932)). Class actions are sometimes compared to bills of peace among numerous parties. Kaplan, *1966 Amendments*, *supra* note 19, at 376. Kaplan explains that "[w]hen numerous persons stood in the same position toward an adversary so that there was potentially a large number of essentially identical lawsuits, equity might in effect allow a consolidation of the expected actions and clear up the entire situation through a bill of peace." *Id.*

152. *Ortiz*, 527 U.S. at 841 (stating, in reference to traditional limited fund class actions, that "mandatory class treatment through representative actions on a limited fund theory was justified with reference to a 'fund' with a definitely ascertained limit, all of which would be distributed to satisfy all those with liquidated claims based on a common theory of liability, by an equitable, pro rata distribu-

2. *Examining The Pleadings Under Rule 23(A)*

Within its criticism of *Ortiz*'s limited fund treatment, the Court noted that the Fifth Circuit incorrectly analyzed the Rule 23(a) commonality and typicality requirements.¹⁵³ The Fifth Circuit analyzed the commonality and typicality requirements outlined in Rule 23(a) almost exclusively *in light of the settlement*, as opposed to taking into account the claims and defenses set forth in the pleadings.¹⁵⁴ The court did this despite the fact that the Supreme Court's analysis in *Amchem* directs that the provisions in Rule 23(a) be applied to the claims and defenses in the pleadings, and not to the substance of the settlement agreement.¹⁵⁵

3. *Adequate Representation Under Rule 23(A)(4)*

The Court's direction that the fund be closely examined by the court was closely tied to its concern that all parties must receive adequate representation under Rule 23(a)(4).¹⁵⁶ Unlike in *Amchem*, the court in *Ortiz* considered the conflicts and competency of *both* class counsel and the class representatives.¹⁵⁷

a. *Conflicts Of Counsel*

The Court believed that plaintiffs' counsel had a conflict of interest and thus could not necessarily be trusted to zealously negotiate on behalf of the class.¹⁵⁸ The Court noted that "[i]n a strictly rational world, plaintiffs' counsel would always press for the limit of what the defense would pay. But with an already enormous fee within counsels' grasp, zeal for the client may relax sooner than it would in a case brought on behalf of one claimant."¹⁵⁹

tion.").

153. *Id.* at 831.

154. *Id.*

155. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997) (comparing Rule 23(b)(3) to 23(a)(3) where claims or defenses of the named representatives must be typical of claims or defenses of the class.) "The words claims or defenses in this context . . . manifestly refer to the kinds of claims and defenses that can be raised in courts of law as part of an actual or impending lawsuit." *Id.* (citing *Diamond v. Charles*, 476 U.S. 54, 76-77 (1986)).

156. *Ortiz*, 527 U.S. at 831.

157. *Amchem*, 521 U.S. at 2250-2251 & n.20.

158. *Ortiz*, 527 U.S. at 852-853.

159. *Id.* at 852 n.30. According to one commentator, judges are also "often predisposed in favor of approving a settlement irrespective of its merits." Puckett, *supra* note 28, at 1281. Judges frequently participate in settlement negotiations, encouraging the parties to settle. *Id.* When the parties finally agree, the judge will

Moreover, the fact that plaintiffs' counsel represented the class as a whole, *as well as* claimants excluded from the class who settled on better terms, was further proof to the Court that the class members in this case did not receive adequate representation as required by Rule 23(a)(4).¹⁶⁰

b. Conflicts Of Class Members

In *Ortiz*, as in *Amchem*, the interests of inventory plaintiffs in collecting for their current injuries conflicted with the interests of future claimants for whom no injury had yet manifested itself.¹⁶¹ This conflict was aggravated by the settlement because the framework "contained spendthrift provisions to conserve the trust."¹⁶² However, the present plaintiffs were necessarily interested in having claims paid right away, while future plaintiffs were more interested in maintenance of the fund to ensure availability of assets sufficient to cover claims in the future.¹⁶³ Thus, the designated class representatives could not possibly adequately represent the whole class.¹⁶⁴

The Court held that, as in *Amchem*, the class claimants should have been divided into subclasses and represented by separate class representatives and counsel.¹⁶⁵ Rule 23(c)(4)(B) requires independent representation for subclasses to ensure that each individual class member receives fair and adequate representation.¹⁶⁶ The fact that no subclasses were defined defeated the purpose of the limited fund which is to ensure that all claimants receive pro rata

probably be hesitant to deny approval of the settlement. *Id.* In addition, a settlement of the suit will remove it from the court's typically overcrowded calendar. *Id.* at 1281-1282.

160. *Ortiz*, 527 U.S. at 852. Plaintiffs' counsel had negotiated the separate settlement of 4,500 pending claims with defendants which were contingent on the success of the global settlement negotiations. *Id.* According to the Court, "the resulting incentive to favor the known plaintiffs in the earlier settlement was, indeed, an egregious example of the conflict noted in *Amchem* resulting from divergent interests of the presently injured and future claimants." *Id.* at 853.

161. *Id.* at 856.

162. *Id.* at 827.

163. *Id.* at 856. As the Court stated previously in *Amchem*, "for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997).

164. *Ortiz*, 527 U.S. at 858.

165. *Id.* at 856-857.

166. FED. R. CIV. P. 23(c)(4)(B) (restated *supra* note 1).

equitable reimbursement for their claims.¹⁶⁷

According to the Court, another subclass that should have been defined, but was not, involved class members whose claims matured between 1957 and 1959, and those whose claims matured after 1959.¹⁶⁸ The reason is that, prior to 1959, Fibreboard was insured against asbestos claims and therefore, pre-1959 class members' claims were worth more on average than those class members whose claims matured after 1959.¹⁶⁹ Class members with claims against Fibreboard during the insured period (pre-1959) had a larger pool of funds to make claims against, while those class members whose claims matured after 1959, could have only made claims against Fibreboard's assets.¹⁷⁰ As a result, pre-1959 claims were valued higher, on average, than post-1959 claims.¹⁷¹ The Court therefore held that the district court erroneously failed to utilize the provision for subclasses in Rule 23 to protect class members from this conflict.¹⁷²

Moreover, the conflict was not resolved by the fact that for settlement purposes, no distinction was made between pre-1959 and post-1959 claimants.¹⁷³ On the contrary, the Court held "the very decision to treat [claims] all the same is itself an allocation decision with results almost certainly different from the results that those with immediate injuries or claims of indemnified liability would have chosen."¹⁷⁴

4. *Due Process And The Seventh Amendment*

Finally, the *Ortiz* Court was very concerned by the use of a limited fund mandatory settlement class to aggregate liquidated tort claims.¹⁷⁵ Certification of such a class flies in the face of the Seventh Amendment because it means that monetary claims are resolved without the opportunity for some to obtain a jury trial.¹⁷⁶ Moreover, members of such a class are provided no opportunity

167. *Ortiz*, 527 U.S. at 841.

168. *Id.* at 857.

169. *Id.*

170. *Id.* at 823 n.2.

171. *Id.*

172. *Id.* at 856.

173. *Id.* at 857.

174. *Id.*

175. *Id.* at 845-846 & n.22.

176. *Id.*

similar to a 23(b)(3) option to opt out of or abstain from the class bound by the settlement.¹⁷⁷ Thus, especially with regard to future claimants, the risk is high that the settlement will preclude many claimants, without their consent, from obtaining their right to a jury trial.¹⁷⁸ Where damage claims will be aggregated, including claims of absent class members, the Court believed due process requires not only notice and an opportunity to be heard, but also, an opportunity to opt out of the class.¹⁷⁹

V. FUTURE IMPACT OF *AMCHEM* AND *ORTIZ* ON CLASS ACTION PRACTICE

The principles discussed in the *Amchem* and *Ortiz* opinions will likely arise in three primary contexts: (1) On appeal of a district court's decision regarding class certification and/or approval of a class action settlement, (2) in the litigated motion for class certification, and (3) in the stipulated simultaneous motion for class certification and settlement approval.

A. *Standard Of Review On Appeal*

Although the Court seemed to understand and sympathize with the lower court's dilemma in connection with the overwhelming number of asbestos suits burdening the system, it nevertheless emphasized that a district court does not have unlimited discretion to certify a class.¹⁸⁰ The Court believed it was restricted by the Rules Enabling Act to maintain a strict interpretation of Rule 23. Courts may not be inventive with class certification or the approval of class action settlements, no matter how good their intentions.¹⁸¹

Under the most recent amendment to Rule 23, appellate courts have discretion to hear appeals of district court class certification decisions.¹⁸² The current standard for reviewing a grant or denial of class certification is whether the district court abused its

177. *Id.* at 846-847; *see also* FED. R. CIV. P. 23(c)(2) and 23(c)(3) (restated *supra* note 1).

178. *Ortiz*, 527 U.S. at 846.

179. *Id.* (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)).

180. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

181. *Id.*; *see also supra* Part V.B.

182. FED. R. CIV. P. 23(f) (restated *supra* note 1).

discretion.¹⁸³ While this will certainly continue to be the standard, the scope of the district court's discretion to certify a class, and to approve a settlement may be more narrowly interpreted on appeal.¹⁸⁴ In light of *Amchem* and *Ortiz*, appellate courts should review district court decisions to ensure that all Rule 23 requirements have been rigorously applied. Approval of class action settlements in particular should receive a heightened level of scrutiny.¹⁸⁵

B. *The Litigated Motion For Class Certification*

With *Amchem* and *Ortiz*, the Supreme Court erected visible guideposts for courts navigating their way through the class certifi-

183. See, e.g., *Pederson v. La. State Univ.*, 213 F.3d 858, 866 (5th Cir. 2000) ("We review a district court's class certification decisions for abuse of discretion."), *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 461 (9th Cir. 2000) ("The district court's decision certifying the class is subject to a 'very limited' review and will be reversed 'only upon a strong showing that the district court's decision was a clear abuse of discretion.'"), *Rutstein v. Avis Rent-a-Car Syst., Inc.*, 211 F.3d 1228, 1233 (11th Cir. 2000) ("Assuming that the district court correctly interpreted the applicable law, we review the court's grant of class certification for an abuse of discretion."), *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 295 (1st Cir. 2000) ("We review rulings granting or denying class certification to ascertain whether the district court's order constituted an abuse of discretion."), *Williams v. Chartwell Fin. Svcs, Ltd.*, 204 F.3d 748, 758 (7th Cir. 2000) ("We review the district court's decision to deny class certification . . . for an abuse of discretion."), *Blyden v. Mancusi*, 186 F.3d 252, 269 (2nd Cir. 1999) ("A district court's decision to certify a class is reviewed for abuse of discretion."), *MacAuley v. IBM Corp., Inc.*, 165 F.3d 1038, 1046 (6th Cir. 1999) ("The standard of review of a trial court's class action certification is 'abuse of discretion.'"), *Alpern v. Utilicorp United, Inc.*, 84 F.3d 1525, 1539 (8th Cir. 1996) ("Denial of class certification is reviewed for abuse of discretion.").

184. For example, many courts are now re-emphasizing that a district court's failure to follow legal standards, such as the requirements outlined in Rule 23, constitutes an abuse of discretion. See, e.g., *Mego Fin. Corp. Sec. Litig.*, 213 F.3d at 461-462 (noting, notwithstanding standard of review, "we must bear in mind the Supreme Court's admonition that the certification requirements . . . demand 'undiluted, even heightened, attention in the settlement context.'"), *Rutstein*, 211 F.3d at 1233, 1234 (citing *Amchem* to decertify class due to failure of class to meet demanding predominance requirement), *Mowbray*, 208 F.3d at 295 (noting "an abuse [of discretion] occurs when a court, in making a discretionary ruling, . . . omits consideration of a factor entitled to substantial weight."), *Blyden*, 186 F.3d at 269 (stating that "the failure to follow the proper legal standards in certifying a class is an abuse of discretion.").

185. *Amchem*, 521 U.S. at 620. But see *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148-1149 (8th Cir. 1999) (distinguishing settlement in a fiercely litigated case from application of "heightened scrutiny" mandated by *Amchem* because collusion was less likely than in a case where settlement was reached before the class was certified).

cation process. One direction from the Court is that conflicts within the class must be closely examined under the adequacy requirement of Rule 23(a).¹⁸⁶ To the extent such conflicts exist, subclasses should be formed using the process set forth in Rule 23(c).¹⁸⁷ Adequacy of counsel should also be examined under Rule 23(a), although some post-*Ortiz* courts have scrutinized this aspect less when a case has been fiercely litigated.¹⁸⁸

Another direction from the court is that the elements of commonality and typicality under 23(a), and the element of predominance under Rule 23(b)(3) should be examined strictly in light of the the pleadings.¹⁸⁹ In addition, when considering certification of a Rule 23(b)(3) class, the predominance inquiry is more demanding than the commonality inquiry.¹⁹⁰

The Court also mandated in *Ortiz*, that if the plaintiffs seek certification pursuant to Rule 23(b)(1)(B), the "limited fund" must be narrowly construed and defined according to the traditional characteristics of limited funds.¹⁹¹ Opponents of the fund must be allowed to attack it and the court must closely examine the fund to ensure its existence is not solely a result of the parties agreement.¹⁹²

C. *The Stipulated Simultaneous Motion For Class Certification And Approval Of Settlement*

The most significant impact of *Amchem* and *Ortiz* will arise in cases involving "settlement classes." These are cases in which a settlement is reached before the class is even certified. While it may seem to many attorneys, and even to many courts, that the benefits of a settlement should suffice to meet the certification requirements of Rule 23, particularly with regard to the fairness and adequacy of representation questions, the Supreme Court obviously disagrees. Looking at a class action from the perspective of the settlement, as opposed to the perspective of the individual class mem-

186. *Supra* Parts III.3 and IV.3.

187. *Supra* Parts III.3 and IV.3.

188. *See, e.g., Petrovic*, 200 F.3d at 1145-1146 (noting that "the circumstances in *Amchem* and *Ortiz* that called for heightened attention to the requirements for [Rule] 23(a) are not present in our case" because the "parties engaged in three years of extensive discovery").

189. *Supra* Parts III.D.2. and V.

190. *Supra* Part III.D.2. and Part V.

191. *Supra* Part IV.D.1.

192. *Supra* Part IV.D.1.

bers, serves to narrow the substantive rights of the class members, particularly in some mandatory class action settlement scenarios where the settling plaintiff is foregoing his or her right to a jury trial.¹⁹³

It is now clear that when simultaneous settlement approval and class certification is sought, analysis of the prerequisites set forth in Rules 23(a) and 23(b) must necessarily *precede* any analysis of the fairness of the settlement under Rule 23(e).¹⁹⁴ Application of the Rule 23(e) "fairness test" may not in any way replace or supercede the requirements set forth under Rule 23(a) and (b).¹⁹⁵ In particular, whether a settlement benefits the class members is not relevant to the predominance inquiry.¹⁹⁶ Only after the court is satisfied that the prerequisites for class certification have been met, may the court go on to consider whether the proposed settlement is fair, adequate and reasonable under 23(e).¹⁹⁷ Rule 23(e) is an *additional* requirement mandating *closer* scrutiny of class actions that purport to have been settled.¹⁹⁸

Once a class has been certified and a court begins its examination of the proposed settlement under Rule 23(e), it may no longer assume that the fact of the settlement is evidence of adequate representation.¹⁹⁹ Rather, courts must closely examine the relationships of class counsel and the class representatives to absent class members to ensure that the interests of absent class members have been adequately represented.²⁰⁰ Where large attorneys' fees are at stake, the court should factor into its analysis of potential conflicts the attorneys' incentives in settling the case.²⁰¹

Conflicts within the class must be dealt with by utilizing the process for forming subclasses set forth in Rule 23(c)(4).²⁰² When

193. *Supra* Parts III.D and IV.D.

194. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621-622 (1997).

195. *Id.*

196. *Supra* Parts III.D.2 and V.

197. In light of the strict structural examination of settlement class actions required under *Amchem* and *Ortiz*, district courts may begin to regularly examine simultaneous certification/settlement approval motions on a bifurcated basis. In this way, it would be clear to appellate courts that a separate and prior examination of Rule 23(a) and (b) requirements was made and district courts would be less likely to run afoul of the Supreme Court's mandate.

198. *Supra* Parts III.D, IV.D, and V.

199. *Supra* Part V.

200. *Supra* Parts III.D.3., IV.D.3. and V.C.

201. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 852 & n.30 (1999).

202. *Supra* Parts III.D.3. and IV.D.3.

members of the class have competing interests and goals, they are not adequately represented unless it is by a representative of a defined subclass with other commonly oriented plaintiffs.²⁰³ Representation of those class members is not adequate unless that subclass has separate counsel.²⁰⁴

Finally, district courts must be very cautious in approving a monetary settlement for a mandatory class. Where a class member's right to a jury trial is implicated, it is questionable whether such a settlement could ever bind absent class members where there was no opportunity for them to opt out of the class.²⁰⁵

VI. CONCLUSION

Contrary to the criticisms of *Amchem* and *Ortiz*, those decisions are not a "death knell" to settlement class action practice.²⁰⁶ The Court simply reminded courts and lawyers alike of their responsibilities to the individual plaintiffs who make up any given class action, and who place their faith in the class action mechanism to provide a fair resolution of their claims. Any appearance of collusion or corruption must be avoided. In the aftermath of these cases, courts must strictly construe Rule 23 at both the class certification and settlement stage of a suit, even if those stages occur simultaneously.

203. *Supra* Parts III.D.3. and IV.D.3.

204. *Supra* Parts III.D.3. and IV.D.3.

205. *Supra* Parts III.D.4. and IV.D.4.

206. Note, *Leading Cases, Federal Practice and Procedure, Class Actions*, 113 HARV. L. REV. 306, 316 (1999) (noting "some commentators have characterized *Ortiz* as tolling the death knell for mass tort settlement class actions").

* * *